Supreme Court, U.S.
FILED
MAR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1407

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., AND ROCHESTER GAS AND ELECTRIC CORPORATION,

*Appellants,*

*v.*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Appellee.*

**On Appeal from the Court of Appeals of the State of New York**

# BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

JOY TANNIAN
COUNSEL OF RECORD FOR APPELLANTS
PETER P. GARAM
CELESTE A. CONTRUCCI

ATTORNEYS FOR
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
4 Irving Place
New York, New York 10003
(212) 460-2063

March 1986

[Counsel continued on inside cover]

[Counsel continued from cover page]

FREDERIC H. LAWRENCE
KENNETH M. JASINSKI
HUBER LAWRENCE & ABELL

ATTORNEYS FOR
NEW YORK STATE ELECTRIC
& GAS CORPORATION
99 Park Avenue
New York, New York 10016
(212) 682-6200

KENNETH D. ARCHER
VICTOR A. ROQUE

ATTORNEYS FOR
ORANGE AND ROCKLAND
UTILITIES, INC.
One Blue Hill Plaza
Pearl River, New York 10965
(914) 577-2422

RICHARD N. GEORGE
NIXON, HARGRAVE, DEVANS
& DOYLE

ATTORNEYS FOR
ROCHESTER GAS AND ELECTRIC
CORPORATION
Lincoln First Tower
Rochester, New York 14603
(716) 546-8000

No. 85-1407

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

---

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., AND ROCHESTER GAS AND ELECTRIC CORPORATION,

*Appellants,*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Appellee.*

---

**On Appeal from the Court of Appeals of the State of New York**

---

# BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants submit this brief in opposition to the Motion to Dismiss Appeal or Affirm Judgment Below ("motion") submitted by the Appellee Public Service Commission of the State of New York (the "Commission").

The Commission's motion erroneously portrays this case as involving merely the review of a routine ratemaking order by which it is simply disallowing "expenses which are *unnecessary* to the rendition of utility services" (motion, p. 8) (emphasis added).

The Commission's motion is based on an erroneous premise. The disallowed costs are *necessary* costs of providing utility services; it cannot be seriously contended that the disallowed costs need not be incurred by the utilities in order to mail bills to their customers.* That being the case, the issue is whether the disallowance of these *necessary* billing expenses, solely because of the content of the messages the utilities put into their billing envelopes, at no cost to their customers, unconstitutionally penalizes the utilities' exercise of their freedom of speech.

## CONCLUSION

The Commission's motion should be denied and, for the reasons stated in our jurisdictional statement and herein, probable jurisdiction should be noted.

---

* Thus, *Rochester Gas and Electric Corp. v. Public Service Commission*, 51 N.Y.2d 823 (1980), *appeal dismissed*, 450 U.S. 961 (1981), so heavily relied on by the Commission (motion, pp. 8-9, 11-12) is, whatever its merits, inapposite for the reasons stated in the appellants' jurisdictional statement (p. 11n.).

Respectfully submitted,

JOY TANNIAN
COUNSEL OF RECORD FOR
APPELLANTS
PETER P. GARAM
CELESTE A. CONTRUCCI

ATTORNEYS FOR
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
4 Irving Place
New York, New York 10003
(212) 460-2063

FREDERIC H. LAWRENCE
KENNETH M. JASINSKI
HUBER LAWRENCE & ABELL

ATTORNEYS FOR
NEW YORK STATE ELECTRIC
& GAS CORPORATION
99 Park Avenue
New York, New York 10016
(212) 682-6200

KENNETH D. ARCHER
VICTOR A. ROQUE

ATTORNEYS FOR
ORANGE AND ROCKLAND
UTILITIES, INC.
One Blue Hill Plaza
Pearl River, New York 10965
(914) 577-2422

RICHARD N. GEORGE
NIXON, HARGRAVE, DEVANS
& DOYLE

ATTORNEYS FOR
ROCHESTER GAS AND ELECTRIC
CORPORATION
Lincoln First Tower
Rochester, New York 14603
(716) 546-8000